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No. 10,186

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MATSON NAVIGATION COMPANY
(a corporation),
Appellant,

vs.

CHARLES HANSEN,
Appellee.

BRIEF FOR APPELLANT.

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STATEMENT OF PLEADINGS AND FACTS SHOWING JURISDICTION.

The District Court for the Northern District of California, Southern Division, had jurisdiction because this action was brought under Section 33 of the Merchant Marine Act of 1920, 41 Stat. 1007, Title 46, United States Code, Section 688 (R. 3),* and the amount involved in the action was over three thousand dollars ($3000.00) (R. 4). The action was instituted by plaintiff, Charles Hansen, a merchant seaman, against Matson Navigation Company, a California corporation, with its principal place of business in San Francisco, California (R. 2, 6). The defendant

*The record is referred to throughout this brief by the designation "R".

was the owner and operator of the vessel Mauna Lei (R. 6), and plaintiff by his complaint sought damages for personal injuries received while employed as a seaman on that vessel (R. 1-4).

Issue was joined by the answer of the defendant, Matson Navigation Company, which admitted ownership and operation of the vessel and the employment of plaintiff as an able bodied seaman on the vessel (R. 6, 7).

From a final judgment in favor of plaintiff (R. 12) this appeal has been taken pursuant to Rule 73 of Federal Rules of Civil Procedure (R. 13). This Court has jurisdiction of the appeal under Title 28, United States Code, Section 225, Subdivision (a), Part First, and Subdivision (d).

STATEMENT OF THE CASE.

A. THE ACTION.

This is an appeal by the defendant, Matson Navigation Company, from a judgment against it in an action for personal injuries under Section 33 of the Merchant Marine Act of 1920, commonly called the Jones Act (Title 46, United States Code, Section 688). Defendant and appellant is a corporation, and plaintiff and appellee was one of the defendant's employees who was employed as an able bodied seaman on the vessel Mauna Lei at the time of the accident. The action is predicated upon the claim that Matson was negligent in failing to supply Hansen with a safe place to work by reason of the negligent stowage of

a deck cargo of steel and by reason of oil on the deck and deck cargo (R. 2, 3). Plaintiff claimed that as a result of such negligence, he slipped and fell and, in falling, involuntarily grasped a moving line whereby his hand was guided into a block and injured (R. 3).

The vessel carried on its forward deck a load of steel beams and bars which were stowed and lashed between the hatch coamings and railings on both the port and starboard sides of the vessel (R. 85, 86). The deckload was shifted by the action of the sea after the vessel left San Francisco and before plaintiff's accident (R. 161).

The answer denies that defendant was negligent in any respect toward plaintiff and denies that defendant negligently failed to supply plaintiff with a safe place to work (R. 7). By affirmative defense, the answer alleged that plaintiff's own carelessness directly and proximately caused the injury and that the risk of sustaining such an injury was one incidental to plaintiff's employment as a seaman (R. 7, 8). The Court, sitting without a jury, found that defendant negligently failed to provide plaintiff with a safe place to work in that the deckload was negligently stowed so that it shifted and fell over, and became rough and uneven, and in that there was oil on the deckload (R. 10). The Court further found that as a result of this condition plaintiff slipped and fell when he was passing over the deckload and, in falling, his hand was placed on a moving line and carried into a block and injured (R. 11).

B. APPELLANT'S GROUNDS FOR REVERSAL.

The Court, sitting without a jury, having given judgment for plaintiff (R. 12), the grounds on which appellant principally relies in asking a reversal of the judgment are:

(1) The evidence does not prove that defendant negligently failed to supply plaintiff with a safe place to work.

This contention is raised under Rule 52 of the Federal Rules of Civil Procedure upon the ground that the finding of fact of negligence is clearly erroneous.

(2) The evidence does not prove that plaintiff was negligent with respect to the stowage or maintenance of the deck cargo.

This contention is raised under Rule 52 of the Federal Rules of Civil Procedure upon the ground that the finding of fact of negligence is clearly erroneous.

C. STATEMENT OF FACTS.

Charles Hansen, appellee, claims that on January 15, 1941, he "slipped and fell" and was injured while walking on a deckload of steel on the SS. Mauna Lei (R. 3). Appellee did not claim that he "tripped"; and he admitted that while the ship was rolling he was thrown from his feet and fell (R. 47).

The Mauna Lei sailed from San Francisco bound for Honolulu on January 8, 1941 (R. 98). It carried

a deck cargo of steel beams of from 40 to 60 feet in length and steel reinforcing bars (R. 85). The steel was piled about 4½ feet high (R. 94). It was stowed on the port and starboard sides of the forward deck on 4 inches of dunnage to give sufficient space so that it could be properly secured with four half-inch steel chains and steel cable lashings fastened with turnbuckles (R. 85, 86). The chains and steel cables were passed under and over the steel and the turnbuckles were fastened to eye bolts on the ship's sides and on the hatch coamings (R. 85, 86).

The uncontradicted testimony is that it is customary on vessels of this type to carry deck cargo (R. 87, 98). In fact, this deck cargo, consigned to Army Engineers in Honolulu, could not have been stowed below decks because the steel beams were longer than the hatch openings (R. 85, 87). The uncontradicted testimony is that the steel was stowed and made fast in a customary, safe, and seamanlike manner (R. 100, 88). In addition to the regular chain lashings, there were extra wire-cable lashings (R. 100).

Plaintiff contended and attempted to show that the deck cargo should have been shored by wooden uprights. He was unable to do this. Captain Monroe, a man of 22 years' experience at sea, and the Superintendent of stevedores at San Francisco, supervised the loading of the steel (R. 84). He testified that it was not the custom on flush deck type vessels such as the Mauna Lei to shore deck cargo; that this deck cargo could not be shored because the vessel had no

fixed iron bulwarks on its sides (R. 87, 88). The Master of the vessel, Captain Gordenev, testified to the effect that shoring was not practical on a flush deck vessel for the same reason that there was not sufficient support for shoring (R. 131, 132). There is no evidence of what more could have been done to prevent the deck cargo from shifting when it encountered the storm and heavy seas outside of San Francisco. The uncontradicted evidence is that the deckload was no larger than that which was ordinarily carried (R. 89).

Plaintiff claimed that his accident resulted from an unsafe place to work in that the deck cargo was not properly stowed (R. 2). The only support for this contention is the assertion that the stowage was temporary (R. 22). This was unexplained. It was denied by the Mate (R. 99). The Mate and Superintendent of stevedores described the method by which the cargo was stowed and testified that it was customary, safe, and seamanlike (R. 98, 100, 88).

After the vessel left San Francisco bad weather was encountered. During the night the vessel rolled heavily and waves broke over the forward and after decks of the vessel (R. 100). The log entry made by the Chief Mate, Rosen, shows the "Vessel rolling heavily and taking heavy seas over the deck, fore and aft" (R. 100). There was a strong gale (R. 101). As a result, the deck cargo shifted. The cause of the shifting was the heavy weather and heavy seas coming over the deck (R. 161). The force of the waves was strong enough to flatten the sixteen-inch steel pipes

on the after deck (R. 101). The morning after the storm (January 9, 1941) Captain Gordenev inspected the damage done by the storm and reported his findings in the log book, as follows (R. 123, 124):

> "Vessel inspected and found (1), forward deckload of steel shifted; nothing lost; (2) 17 welded steel pipes of after deckload flattened by sea; (3) few carboys of acid damaged, contents gone; inside of vessel, 17 welded steel pipes flattened by cargo stowed on top. Caterpillar tractor loose, damage slight, if any. General cargo in shelter of deck shifted and some fell."

The steel on the forward deck was too heavy to move or rearrange with the ship's gear and it had to remain as it was (R. 162). Customary practice, however, did not require that the vessel turn back to port after the shifting of the cargo (R. 124, 125).

After the deckload shifted, the chain and steel cable lashings holding the deckload were tightened (R. 101). The turnbuckles were examined every morning and night thereafter and if there was any slack in the lashings they were tightened (R. 130). There was no proof that if the deck cargo had been shored, it would not have shifted.

It was in this setting that the accident to Hansen occurred on January 15, 1941, the day before arrival in Honolulu.

On that day the crew was ordered to the forward deck at 1 P. M. to raise the gear preparatory to arriving in port (R. 102). This is the usual practice on all vessels, weather permitting (R. 142, 158). On this

day the sea was calm (R. 142). The log book showed that there was only a slight breeze and small sea (R. 108).

The members of the crew were assigned to their places by Mr. Rosen, the First Mate. Hansen was assigned to slack away on the starboard guy line of the No. 1 starboard boom while the booms were being raised (R. 102). His position was next to the mast house on the forward starboard side of the vessel (R. 142, 143). He had a space of 3 to 4 feet between the deckload and the mast house within which to work (R. 143). The topping lift line in which he later caught his hand passed into a block on the mast house aft of the cleat on which the starboard guy line was fastened.

After all the men, including Hansen, were in their places, First Mate Rosen gave the order to "Heave Away!" (R. 103, 146); the winches were started by the boatswain; and the No. 1 port and starboard booms started to lift out of their cradles (R. 103, 147). Rosen was standing on the No. 1 hatch facing the boatswain and the place where Hansen was standing (R. 103).

When the booms were about 6 feet out of their cradles, the block on the port rigging slipped and the booms were stopped by order of Rosen (R. 103, 147). The port boom was lowered into its cradle and the starboard boom remained suspended (R. 104). Rosen supervised the adjustment of the block on the port rigging and according to him there were no adjustments of any kind necessary on the starboard rigging (R. 104).

The evidence is conflicting as to where the accident occurred. Plaintiff testified he was standing at his assigned position on the starboard side of the mast house when the booms were stopped (R. 25); that the block on the starboard rigging had slipped (R. 28); that he was told by Lecht, the boatswain, to go and put a "stopper" on it, which he did (R. 30); and that as he was returning over the deckload to his assigned position by the mast house the ship rolled and he was thrown on the topping lift line (R. 47). At that instant the line began to move and his hand was drawn into the block on the starboard side of the mast house and was injured (R. 49).

The mate testified that it was the block on the port, not starboard, rigging which needed adjustment and which required the stopping of the booms (R. 104). This was confirmed by Lecht, the boatswain, when he signed a written statement made shortly after the accident (R. 78-80) but was denied by him in Court (R. 72). Hansen was supposed to stay in his place at the starboard side of the mast house (R. 106). Nothing needed adjustment on the starboard rigging (R. 106).

After the adjustment of the block on the port rigging Rosen gave the order to "Heave away!" (R. 104). The boatswain called out "All clear!" and started the winches (R. 104). An instant later Hansen cried out in pain and was seen pulling his hand out of the block which was attached to the starboard side of the mast house (R. 104). Hansen said he didn't hear the mate give the order to "Heave away!" or the boatswain cry out his warning as he was returning

over the deckload just before the accident (R. 48), although Mr. Encell, the Second Mate, who was on the bridge overlooking the operation, heard both the command of Mate Rosen and the warning of the boatswain (R. 148).

Hansen testified that he was slipping while he walked over the deckload but that just as he was near the edge, the ship was rolling, and he was thrown into the topping lift line (R. 47). The log book entry made on January 15, 1941, shortly after the accident, reads (R. 109):

> "At sea. While topping No. 1 booms AB. seaman C. Hansen was handling starboard outside guy and trying to pull in the slack. *He caught his left hand in the block when the ship took a roll.* He injured his fingers—middle finger cut off and three other fingers injured. The Purser, W. D. Hicks, applied first aid." (Emphasis supplied)

The Court found that there was oil on the steel over which plaintiff claimed that he walked just before the accident (R. 10). The evidence is that there was grease around the winch, but that was a usual condition (R. 70, 108). It is necessary to grease the winches before they may be used (R. 51). At the time of the accident there was less oil than usual around the winches because the deck had been washed clean by the waves in the storm which had occurred after the vessel left port (R. 108). The winch was some distance from where plaintiff claimed he was injured, and the evidence does not show how the oil got on top of the deckload four and one-half feet above the level of the deck.

SPECIFICATION OF ERRORS RELIED UPON.

1. The finding of fact by the District Court that defendant negligently failed to supply plaintiff with a safe place to work (R. 10) is clearly erroneous in that it is unsupported by the evidence and is contrary to the clear weight of evidence.

This contention is raised upon the authority of Rule 52 (b) of the Federal Rules of Civil Procedure which provides in part that when findings of fact are made in actions tried by the Court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the objection has made, in the District Court, an objection to such findings or has made a motion to amend them or a motion for judgment.

2. The finding of fact of the District Court that the deckload of steel was stowed aboard said vessel in such a negligent manner that shortly after leaving San Francisco said steel deckload shifted, fell over, and became uneven (R. 10) is clearly erroneous in that it is unsupported by the evidence and is contrary to the clear weight of the evidence. The foregoing finding of fact of the District Court is in effect a finding that because the deck cargo shifted the appellant was therefore negligent with respect to the stowage thereof.

This contention is raised upon the authority of Rule 52 (b) of the Federal Rules of Civil Procedure.

3. The finding of fact by the District Court that due to the negligent and careless manner in which said deck cargo of steel was maintained aboard the vessel

by defendant, and the oil on the steel beams and around the vicinity in which plaintiff was working, plaintiff slipped and fell and in so falling received injuries (R. 11) is clearly erroneous in that it is unsupported by the evidence and is against the clear weight of evidence.

This contention is raised upon the authority of Rule 52 (b) of the Federal Rules of Civil Procedure.

4. The finding of fact of the District Court that due to the negligence of defendant, plaintiff slipped and fell (R. 11) is erroneous in that it is unsupported by the evidence and contrary to the clear weight of evidence.

This contention is raised upon the authority of Rule 52 (b) of the Federal Rules of Civil Procedure.

THE EVIDENCE DOES NOT PROVE THAT APPELLANT NEGLIGENTLY FAILED TO SUPPLY PLAINTIFF WITH A SAFE PLACE TO WORK.

A. SPECIFICATION OF ERRORS INVOLVED.

No. 1.

The finding of fact by the District Court that defendant negligently failed to supply plaintiff with a safe place to work (R. 10) is clearly erroneous in that it is unsupported by the evidence and is contrary to the clear weight of evidence.

No. 2.

The finding of fact of the District Court that the deckload of steel was stowed aboard said vessel in such

a negligent manner that shortly after leaving San Francisco said steel deckload shifted, fell over, and became uneven (R. 10) is clearly erroneous in that it is unsupported by the evidence and is contrary to the clear weight of the evidence. The foregoing finding of fact of the District Court is in effect a finding that because the deck cargo shifted the appellant was therefore negligent with respect to the stowage thereof.

No. 3.

The finding of fact by the District Court that due to the negligent and careless manner in which said deck cargo of steel was maintained aboard the vessel by defendant, and the oil on the steel beams and around the vicinity in which plaintiff was working, plaintiff slipped and fell and in so falling received injuries (R. 11) is clearly erroneous in that it is unsupported by the evidence and is against the clear weight of evidence.

B. SUMMARY OF ARGUMENT.

Appellee Hansen claimed that he was injured while walking across a deck cargo of steel which had been stowed and made fast in the customary manner with steel chains and cables. The deck cargo was shifted by heavy seas breaking over the vessel after it left port and before the accident. The causes of the accident were the heavy storm which shifted the vessel's cargo, through no fault of appellant, and the rolling of the ship which threw appellee against a moving line. Negligence cannot be predicated upon a situation resulting from conditions outside the control of the person

charged with such negligence. There is no substantial evidence of any negligent act or omission on the part of appellant proximately causing appellee's injuries. The finding of fact of the District Court that appellant negligently failed to supply appellee with a safe place to work is clearly erroneous.

C. DISCUSSION.

1. There must be proof of negligence under the Jones Act.

The gravamen of a Jones Act suit (Title 46, United States Code, Section 688) is negligence, and plaintiff must prove by substantial evidence that defendant acted, or failed to act, as a reasonably prudent man would not, or would have, acted under the circumstances.

American Pacific Whaling Co. v. Kristenson, (CCA 9th), 93 Fed. (2d) 17.

The fact that an accident happens is not proof of negligence. It is incumbent upon the plaintiff to show with reasonable certainty that he was injured as the result of some negligent act of the defendant.

Luckenbach SS. Co. v. Buzynski, (CCA 5th), 19 Fed. (2d) 871, 874, 1927 A.M.C. 1185;

Patton v. Tex. & P. R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361.

In the leading case of *Patton v. Tex. & P. R. Co.,* supra, the Supreme Court, at page 663 of the official report, sets forth the rule that the negligence of an employer must be proved by substantial evidence:

> "The fact of accident carries with it no presumption of negligence on the part of the em-

ployer, and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence. Texas & Pacific Railway v. Barrett, 166 U. S. 617. Second. That in the latter case it is not sufficient for the employe to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. Third. That while the employer is bound to provide a safe place and safe machinery in which and with which the employe is to work, and while this is a positive duty resting upon him and one which he may not avoid by turning it over to some employe, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe." (Citing cases)

Negligence is usually defined as the doing of some act which a reasonably prudent person would not do or the failure to do some act which a reasonably prudent person would do under the circumstances.

See:

Speer v. Leuenberger, 44 Cal. App. (2d) 236, 246, 112 Pac. (2d) 43.

An application of the phrase "under the circumstances" is found in the disposition made by the Courts of the doctrine of assumption of risk in Jones Act cases. Although that defense has been held not to apply, still in determining whether a shipowner has been negligent toward a seaman, it must be considered that the seaman does assume those risks which are reasonably and necessarily incident to his employment, which by its nature has certain inherent dangers not incident to most shore occupations. This proposition is discussed in *Miller v. Dollar Steamship Lines,* 19 Cal. App. (2d) 206, 64 Pac. (2d) 1163, (hearing in Supreme Court denied), where, at page 210, the Court says:

> "Appellant relies upon the statement in the opinion in Beadle v. Spencer, 298 U. S. 124 (56 Sup. Ct. 712, 714, 80 L. Ed. 1082), reading 'It is unnecessary to repeat here the reasons given in the opinion in The Arizona, supra [298 U. S. 110, 56 Sup. Ct. 707, 80 L. Ed. 1075], for our conclusion that assumption of risk is not a defense to a suit brought by a seaman under the Jones Act for negligent failure of the master to provide safe appliances or a safe place in which to work.' The statement is slightly inaccurate in the broad use of the term 'a safe place in which to work', because, as pointed out in the opinion of Justice Stone in The Arizona, 298 U. S. 110 [56 Sup. Ct. 707, 711, 80 L. Ed. 1075], 'The seaman assumes the risk *normally* incident to his perilous calling' but not of the owner's failure 'to provide a sea-

> worthy ship and safe appliances'. It would have been more accurate to have said in the Beadle case a *reasonably* or *normally* safe place to work because it is apparent that in different parts of the ship there are places of work normally safe for one class of employees which would be wholly unsafe for those of another class. It may be taken as settled law that, though a seaman does not assume the risk of injury caused by unseaworthiness of the ship or by defective appliances, he does assume those obvious or known risks necessarily and reasonably incident to the peculiar type of his employment."

As an incident to his type of employment Hansen assumed the risk of injuries which might result from the rolling of the ship and the danger of being thrown from his feet as a result thereof. Hansen also assumed the risk of injuries which resulted from conditions aboard the vessel which were directly attributable to a peril of the sea and not to the misfeasance of the officers of the vessel. Moreover, appellant had no absolute obligation to furnish appellee with a safe place to work, for that would constitute appellant an insurer. Appellant's obligation was to use reasonable care in accordance with accepted practices of mariners to see that appellee had a safe place to work.

Appellant submits that the evidence, and the clear weight thereof, taken most favorably to appellee, not only fails to show any improper act or omission on the part of appellant, but, on the contrary, affirmatively establishes that the stowage of the deck cargo was proper and that the oil on the deck was the necessary result of the operation of the winches.

2. The deckload shifted through no fault of appellant.

In its findings of fact the Court found that the deckload was stowed in such a negligent manner that "it shifted, fell over and became uneven" (R. 10). The District Court thus in effect finds that because the deck cargo did shift it must be concluded that the appellant was negligent in its stowage.

In *Delaware R. R. Co. v. Koske,* 279 U. S. 7, the plaintiff proceeding under the Federal Employers Liability Act (which is incorporated by reference in the Jones Act), charged that he fell into a ditch near the track while alighting from a train. At page 10 of the report, the Court says:

> "The Employers Liability Act permits recovery on the basis of negligence only. The carrier is not liable to its employees because of any defect or insufficiency in plant or equipment that is not attributable to negligence. The burden was on the plaintiff to adduce reasonable evidence to show a breach of duty owed by defendant to him in respect of the place where he was injured and that in whole or in part his injuries resulted proximately therefrom."

The record in this case shows that the deck cargo was stowed in a customary, safe and seamanlike manner (R. 88, 98, 100). There were four chains passed under and over the deckload in addition to half inch steel cables, all of which were made fast by turnbuckles (R. 86). As shown by the log, the actual cause of the shifting of the deck cargo was the storm encountered by the vessel after it left San Francisco (R.

123, 124). Mr. Encell, the Second Mate of the vessel, testified in his deposition that this was the cause of the shifting (pp. 161, 162). This is not contradicted. There is no evidence that any other type of stowage would have prevented the shifting of the cargo. The force of the sea and waves was great enough to flatten the steel pipes on the after deck and to injure cargo in the hold (R. 123, 124). Naturally, it was heavy enough to shift the steel on the forward deck. Appellee's attempt to show that, if the deckload had been shored with wooden timbers, the shifting would not have occurred, failed to elicit any evidence in support thereof. The evidence which he was able to elicit from the witnesses was that it was either impossible or impractical to shore the deck cargo because the Mauna Lei was a flush deck type of vessel with no steel bulwarks (R. 87, 131-132). Moreover, there is no evidence that shoring would have prevented the shifting of the cargo in any event.

The evidence that the deckload shifted because of the action of the waves breaking over the deck was entirely disregarded by the lower Court and there is no evidence the shifting was caused by anything else. There is the suggestion in the record that the lashings were temporary (R. 22). There was no proof of what type of stowage would have been other than temporary; nor that temporary stowage was improper. There was no proof of what type of stowage would have been permanent or that permanent stowage was proper. Such a conclusion is not enough to constitute substantial evidence of negligent conduct on the part of appel-

lant. It establishes nothing in the way of proof of any negligent act or omission of appellant. It is purely a designation that could be applied to any type of stowage or any operation, for that matter.

In a sense, all stowage of cargo is temporary. The cargo does not become a part of the ship after stowage. It is meant to be removed at the end of the voyage. Since the force of the sea was enough to flatten steel pipe and injure cargo in the hold (R. 101), it is not surprising that it moved the deck cargo. Moreover, the evidence does not show that even with the shoring alluded to by counsel for appellee the result of the storm would have been any different. Appellant, under the Jones Act, was not required to guarantee that the deck cargo would not shift in a heavy storm or from other natural causes not under appellant's control. Appellant's sole duty was to load and stow the deck cargo in a manner which custom and practice among seafarers had shown was proper, adequate and safe. This appellant did. The District Court chose to believe Hansen's version of where the accident occurred as correct (see p. 9, supra). Assuming that the conflict of evidence as to where the accident happened has been resolved in favor of appellee, such evidence still fails to establish negligence on the part of appellant. If the surface of the deckload was rough and uneven, this was directly attributable to the storm and heavy seas through which the vessel had passed, not to the negligence of appellant.

The error of the Court was in concluding that since the accident had occurred on the deck cargo, the deck

cargo was an unsafe place to work and consequently appellant was negligent with respect thereto and responsible therefor. Such a finding constitutes appellant an insurer, because there is no finding, and no evidence upon which to base one, of what act or omission of appellant constituted the negligent stowage of cargo. The judgment makes appellant responsible for the shifting of the cargo and the resulting accident not because appellant negligently did or failed to do anything with respect to stowage, but because the cargo did in fact shift. The proposition is well established that a shipowner does not insure against the perils of navigation. A shipowner is responsible only when it is negligent and when that negligence proximately causes the injury.

Pittsburg SS. Co. v. Palo, (CCA 6th), 64 Fed. (2d) 198, 200, 1933 A.M.C. 1031;

Taylor v. Calmar SS. Co., (CCA 3rd), 92 Fed. (2d) 84, 86.

3. The oil on deckload was the necessary result of operation of the winches.

The Court admitted in evidence a photograph as Plaintiff's Exhibit No. 3, showing a certain amount of grease on the bed of the winch (R. 21, 22). The photograph does not show the scene of the accident nor the surrounding areas at the time of the accident. Hansen was not injured while working on the winch or about the winch (R. 34) but while he was some feet away on the deckload. The photograph was taken after the Mauna Lei had arrived at Honolulu and after the winch had been operated for several days (R. 50, 35).

The photograph did not show the condition of the deckload on January 15, 1941; nor did it show the condition of the deck around the winch on that day. The photograph did not show the place where Hansen claimed he was injured, and the place where the Court found he was injured.

The District Court found that there was a considerable amount of oil on the deck and that there was oil on the deckload (R. 10). On the day of the accident, there was no more oil than usual around the winch (R. 108). In fact, there was less than usual because the winches had not been used for six days and the deck had been washed clean by the action of the sea breaking over it several days before (R. 108). The oil was on the deck and not on the deckload, the top of which was variously described as being from four and one-half to six feet above the level of the deck (R. 94, 22). The only way oil could have gotten on the deckload itself was if Hansen had tracked it there or Hansen had the oil on his shoes at the time he was thrown from his feet.

According to his testimony, Hansen left his place by the mast house and crossed the deckload to the starboard rigging about eight to ten feet away (R. 30). He returned from the rigging over a different route and as he reached the inboard edge of the deckload he was thrown from his feet by the rolling of the vessel and fell (R. 47). It does not appear what effect, if any, the oil played in Hansen's fall. Assuming for the argument that the oil did contribute in part to Hansen's fall, the presence of oil where Hansen could pick it

up on his shoes and track it with him does not constitute negligent conduct on the part of appellant. The oil was the necessary result of the operation of the winches. The winches had to be greased and oiled preparatory to their use. So much seems to be admitted on all sides (R. 51). If Hansen got some of the oil on his feet, it was not the result of any failure or fault on the part of the shipowner to exercise reasonable care, but it was one of the normal risks aboard a vessel which is necessarily incident to the work of a seaman.

Miller v. Dollar Steamship Lines, 19 Cal. App. (2d) 206, 64 Pac. (2d) 1163.

THE ACTUAL CAUSE OF THE ACCIDENT WAS THE ROLLING OF THE VESSEL WHEREBY HANSEN WAS THROWN AGAINST A MOVING LINE.

A. SPECIFICATION OF ERROR INVOLVED.

No. 6.

The finding of fact of the District Court that due to the negligence of defendant plaintiff slipped and fell (R. 11) is erroneous in that it is unsupported by the evidence and contrary to the clear weight of evidence.

B. DISCUSSION.

Hansen testified that as he was proceeding over the deckload the vessel was rolling and he was thrown on the topping lift line, which at that instant began to move (R. 49). The line drew his hand into a block attached to the mast house and caused his injuries

(R. 26). The line was not moving before Hansen fell, but started to move at the exact instant his hand grasped it (R. 49). The entry in the log book made by Rosen, the Mate, stated that Hansen "got his left hand in the block when the ship took a roll" (R. 109). It thus appears that the efficient cause of the accident was the rolling of the vessel which caused Hansen to be thrown from his feet and accidentally place his hand upon the line which drew it into a block and caused his injuries.

Prior to starting the winches in motion Rosen, who was standing on the No. 1 hatch facing Hansen and the place where Hansen claims he fell, gave the order, in a loud voice, to "Heave away!" (R. 104), the boatswain then called out "All clear!" and started to operate the winches. (R. 104.) A second or so later Hansen was heard to cry out in pain when his hand was drawn into the block (R. 104). Hansen claimed he did not hear the warnings of Rosen and the boatswain (R. 48), although he was only from eight to ten feet from his assigned position at the mast house (R. 46). Mr. Encell, the Second Mate, who was on the bridge overlooking the operation, heard the warnings (R. 148).

Assuming Hansen's version of the accident to be the correct one, no reasonable person could anticipate that at the instant the winches were started after the repairs were made to the port rigging the vessel would "take a roll", Hansen would be thrown from his feet and his hand would fortuitously happen to land on a moving line and be drawn into a block.

Nor could any reasonable person anticipate that any similar injury would occur from the rolling of the ship, when the weather was clear and the sea was calm. This accident comes clearly within that class of accidents which often happen at sea and which are the fault of no one. As was said in the *Cricket* (CCA 9th), 71 Fed. (2d) 61, 1934 A.M.C. 1035, at page 63:

> "The life of a seaman is hard. The nature of his calling subjects him to many dangers. One of these is the hazards of a heavy sea. The sailor knows this and assumes the risks incidental to his calling. In Maloney, etc. v. U. S., 1928 A. M. C. 288, the deceased was struck by a heavy wave (the first to come on deck), which threw him down a stairway causing injuries from which he died. It was held that the accident was due to natural perils of navigation which Maloney assumed."

Hansen's fall and injury come within the category of those numerous happenings at sea which are purely fortuitous and could not be avoided by the exercising of reasonable care upon the part of the ship or its officers.

Hoeffner v. National SS. Co. (CCA 9th), 1 Fed. (2d) 844.

The act of working on or about any deck cargo load carries with it certain risks of injury which cannot be avoided if the vessel is to be operated and carry out its functions. The Jones Act is not a workmen's compensation statute designed to compensate seamen for injuries arising out of and in the course

of employment. Congress has not seen fit to extend such legislation to seamen, perhaps because they receive the maritime benefits of maintenance and cure which were fully paid in this case (R. 11, 64). In fastening liability for Hansen's accident on appellant the District Court made appellant responsible for an accident which resulted from conditions outside its control. The District Court, in effect, found that appellant was liable for appellee's injuries because the injuries arose in the course of his work.

CONCLUSION.

Under the Federal Rules of Civil Procedure this Court has become a Court of review in cases tried at law without a jury, rather than solely a Court of error.

> Rule 52(a), *Fed. Rules of Civ. Procedure; Aetna Life Insurance Co. v. Kepler* (CCA 8th), 116 Fed. (2d) 1.

We submit that after resolving all conflicts of evidence in favor of appellee and after giving due regard to the opportunity of the District Court to judge the credibility of the witnesses, a review of the record shows that the findings of fact of the District Court are unsupported by substantial evidence and are clearly against the weight of evidence. There is no substantial evidence of any act or omission with respect to the stowage of the deck cargo on the Mauna Lei from which it can be inferred that appellant was negligent. On the contrary the evidence

affirmatively proves that the stowage of the deck cargo was done in a safe and seamanlike manner. The fact that the cargo shifted from the force of waves breaking over the deck is not evidence of improper stowage in the absence of affirmative facts showing wherein and in what respect such stowage was improper.

It is urged that the same principle is applicable to the matter of the oil on the deckload. There is no evidence that the oil caused appellee to fall; and even if there were, the clear weight of evidence is that some oil is the unavoidable result of greasing and oiling the winches preparatory to their use and is one of the dangers incidental to a seaman's employment. The finding of fact in the District Court in this respect is clearly against the weight of the evidence.

It is therefore respectfully submitted that the judgment should be reversed with direction to enter judgment for appellant.

Dated, San Francisco, California,
August 31, 1942.

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